88-240

No. _____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

GAF CORPORATION,

*Petitioner*,

—v.—

ROSEMARIE ERICH, CONCEPCION REIDER, and ELIZABETH ZONDLER, on behalf of themselves and all others similarly situated,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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## QUESTIONS PRESENTED

1. Does ERISA preempt state law in relation to a plan that provides vacation benefits that are paid out of an employer's general assets?

2. Does ERISA's intent that trust principles govern plan fiduciaries' actions preclude *de novo* judicial review of an interpretation of the terms of an employee welfare benefit plan using contract principles and require review under the arbitrary and capricious standard of trust law?

## PARTIES TO THE PROCEEDING

The named appellants and cross-respondents in the Supreme Court of the State of New Jersey were Rosemarie Erich, Concepcion Reider, and Elizabeth Zondler, suing on behalf of themselves and as representatives of all other terminated employees of GAF Corporation ("GAF"). The respondent in the Supreme Court of New Jersey was GAF. Pursuant to Rule 28.1, GAF states that it has no parent corporation or subsidiaries that are not wholly owned. GAF is affiliated with a West German corporation, GAF-Huls Chemie GmbH.

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ROSEMARIE ERICH, CONCEPCION REIDER, and ELIZABETH ZONDLER, on behalf of themselves and all others similarly situated,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

GAF Corporation ("GAF") respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New Jersey entered in this case on May 10, 1988. That judgment involves two extremely important and recurring questions under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"): (1) whether ERISA applies to, and preempts state law relating to, a plan adopted by an employer to provide vacation benefits for its employees, where such benefits are paid out of the general assets of the employer, and (2) what standard of judicial review should apply to a plan fiduciary's interpretation of the terms thereof. There are irreconcilable differences among the circuits and the courts of last resort of New Jersey and Massachusetts

with respect to these questions. Review by this Court is urgently needed to guide the lower courts and to effectuate the intent of Congress in its enactment of ERISA.

## OPINIONS BELOW

The opinions of the Superior Court of New Jersey, Law Division (App. 12a-20a),[1] are unreported. The opinion of the Superior Court of New Jersey, Appellate Division (App. 10a-11a), which affirmed, *per curiam*, the decision of the Law Division on the questions presented by this Petition, is also unreported. The opinion of the Supreme Court of New Jersey (App. 1a-9a), which reversed the decision of the Appellate Division on the questions presented by this Petition, is reported at 110 N.J. 230 and 540 A.2d 518.

## JURISDICTION

The judgment of the Supreme Court of New Jersey, which is the highest court of the State of New Jersey, was entered on May 10, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## STATUTORY PROVISIONS INVOLVED

The terms "employee welfare benefit plan" and "welfare plan" are defined in section 3(1) of ERISA, 29 U.S.C. § 1002(1). The terms "employee benefit plan" and "plan" are defined in section 3(3) of ERISA, 29 U.S.C. § 1002(3). Section 4 of ERISA, 29 U.S.C. § 1003, sets forth the scope of and exemptions from Title I of ERISA. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), mandates the preemption of state law as it relates to employee benefit plans subject to and not exempt from Title I of ERISA under section 4 thereof. Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), and section 302(c)(5) of the Labor Management Relations Act, 1947

1 "App." refers to the Appendix to this Petition.

("LMRA"), 29 U.S.C. § 186(c)(5), contain fiduciary responsibility provisions relevant to the standard of review question. The statutory provisions and other relevant portions of ERISA and regulations promulgated thereunder are set forth in the Appendix (App. 21a-36a).

## STATEMENT OF THE CASE

Plaintiffs (the respondents herein) commenced this action to recover, on behalf of themselves and other terminated employees of GAF, lump-sum vacation pay under the GAF Vacation Pay Guideline (the "GAF Plan") they claimed they had earned and accrued while working for GAF. GAF refused to pay them these monies upon termination of their employment because it interpreted the GAF Plan as not requiring these payments, which GAF viewed as a double payment of vacation benefits. Plaintiffs were certified as representatives of a nationwide class of former employees of GAF similarly situated.

The GAF Plan sets forth in writing the terms of the plan and program under which GAF pays vacation pay benefits to its employees. Those benefits are paid out of the general assets of GAF.

On cross-motions for summary judgment, the Law Division ruled in GAF's favor. That court held that GAF's determination that plaintiffs were not entitled to vacation benefits under the GAF Plan was neither arbitrary nor capricious, the applicable standard for reviewing a denial of benefits under a welfare benefit plan subject to ERISA (App. 15a). The court had previously held the GAF Plan subject to ERISA (App. 17a-18a).

On appeal, the Appellate Division of the Superior Court of New Jersey affirmed the Law Division's judgment, *per curiam*, substantially for the reasons expressed by the Law Division below (App. 10a-11a).

On plaintiffs' application, the Supreme Court of New Jersey granted certification of the decision of the Appellate Division and reversed these holdings. The court concluded, first, "that it

is probably incorrect to assume that Congress intended that issues of vacation pay should become issues of federal law," agreeing with and relying upon a law review note that so concluded.[2] 110 N.J. at 237, 540 A.2d at 521 (App. 7a). The court then went on to conclude, in light of *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, 485 U.S. ____, 108 S.Ct. 1288, 99 L.Ed.2d 498 (1988), that,

> rather than create a conflict within New Jersey, depending on the choice of state or federal forum, and because we believe that the policies of the law with respect to preemption do not apply with equal force to unfunded vacation pay benefits, we conclude that the *Firestone* standard is the correct standard to be applied in these circumstances. That standard is similar to the standard of review that would be applicable under state law.

110 N.J. at 239, 540 A.2d at 522 (App. 8a). Therefore, the Court reversed the judgments below in favor of GAF and remanded the cause for determination "whether or not plaintiffs have established a claim based on principles of 'contractual construction.' " 110 N.J. at 240, 540 A.2d at 523 (App. 9a) (quoting *Firestone*, *supra*, 828 F.2d at 147).

The federal questions sought to be reviewed herein were raised in briefs filed with, and were decided by, each of the State courts below, as set forth in their opinions reproduced in the Appendix to this Petition. See App. 1a-20a.

The judgment of the Supreme Court of New Jersey is a final judgment, within the meaning of 28 U.S.C. § 1257(3), inasmuch as it finally decided the federal questions raised herein and further proceedings on remand would be precluded by a reversal of that judgment in the interests of the uniform application of the standard of review mandated by ERISA. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975); *Goodyear Atomic Corp. v. Miller*, 486 U.S. ____, ____, 108 S.Ct. 1704, 1709, 100 L.Ed.2d 158, 167-68 (1988).

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2 Note, *Unfunded Vacation Benefits: Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702 (1987) (hereinafter cited as "*Note*").

## REASONS FOR GRANTING THE WRIT

1. The circuits and the state courts of last resort that have confronted the issue of ERISA's applicability to unfunded vacation benefit plans and its preemption of state law relating to such plans have divided evenly. The Fourth and Sixth Circuits, joined by the Supreme Judicial Court of Massachusetts, have upheld ERISA applicability and preemption.[3] The Second and Ninth Circuits, joined now by the Supreme Court of New Jersey, have held to the contrary.[4] Other circuits before which the issue has come, notably the Third and Seventh Circuits,[5] have avoided confronting it, indicating uncertainty as to the state of the law. Given the popularity of such plans[6] and the clear willingness of the States to entertain regulation of such plans, the need for a definitive and dispositive answer to this issue is critical. The decision to deny ERISA's application to unfunded vacation pay, if allowed to stand, can only lead to the subjection of interstate employers to vastly different regulation of a single company-wide vacation pay plan in each of the various jurisdictions in which the company does business—the very evil which Congress sought to eliminate when it mandated ERISA preemption.

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3 *Holland v. National Steel Corp.*, 791 F.2d 1132 (4th Cir. 1986); *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Barry v. Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985); *Commonwealth v. Morash*, 402 Mass. 287, 522 N.E.2d 409 (1988), *petition for cert. pending*, No. 88-32.

4 *Shea v. Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987); *California Hospital Ass'n v. Henning*, 770 F.2d 856 (9th Cir. 1985), *rev'g* 569 F. Supp. 1544 (C.D. Cal. 1983), *opinion modified and reh'g denied*, 783 F.2d 946 (9th Cir.), *cert. denied*, 477 U.S. 904 (1986).

5 *McMahon v. McDowell*, 794 F.2d 100, 103-4 n. 1 (3d Cir.), *cert. denied*, 479 U.S. _____, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986); *National Metalcrafters v. McNeil*, 784 F.2d 817, 822-23 (7th Cir. 1986).

6 In 1984, vacation pay accounted for an estimated 5.2% of wages and salaries in the United States. Economic Policy Division of Chamber of Commerce of the United States, 1984 Economic Benefits 30 (1985).

2. This Court has heretofore granted review of the second issue presented in this case—that of the standard of review of the claim determination of a plan administrator—in *Firestone Tire & Rubber Co. v. Bruch*, No. 87-1054, now before this Court on its merits. For the same reasons that this Court granted review in *Firestone*, it should grant review in this case. Review of this issue here is also necessary to permit the enunciation of a standard of review applicable to vacation benefit plans, and not merely severance plans.

## I. THE STATE COURT'S DETERMINATION THAT ERISA DOES NOT GOVERN AND PREEMPT STATE LAW IN RELATION TO UNFUNDED VACATION PAY PLANS CONFLICTS WITH THE DECISIONS OF TWO CIRCUITS AND ANOTHER STATE COURT OF LAST RESORT AND WITH THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE.

### A.

Prior to the decision in this case, four circuits and the highest court of Massachusetts had considered the issue of the applicability of ERISA to unfunded vacation pay plans such as the GAF Plan at issue herein.[7] The first circuit to confront the issue was the Ninth Circuit. In *California Hospital Ass'n v. Henning*, 770 F.2d 856 (9th Cir. 1985), *rev'g* 569 F. Supp. 1544 (C.D. Cal. 1983), opinion modified and reh'g denied, 783 F.2d 946 (9th Cir.), *cert. denied*, 477 U.S. 904 (1986), the court upheld the right of the State of California, by statute, to bar forfeiture of vacation pay and require payment of a pro rata share of such pay on termination. It rejected the contention of the plaintiffs that section 514(a) of ERISA preempted such state regulation. The Ninth Circuit based its rejection of preemption on a regulation adopted by the U.S. Department of Labor ("DOL"), 29 C.F.R. § 2510.3-1(b)(3). That regulation purports to exclude from the definition of "employee welfare benefit plan" in section 3(1) of ERISA, 29 U.S.C. 1002(1), various "payroll practices," including the "[p]ayment of compensation, out of the

7 See nn. 3 and 4, *supra*.

employer's general assets . . . while an employee is on vacation. . . ."

The Ninth Circuit believed that regulation carried "persuasive weight because it was formulated contemporaneously with the passage of ERISA," 770 F.2d at 859 (citing *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981)), and " 'is based on a permissible construction of the statute,' " *id.* (quoting *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984)). The Ninth Circuit found in the regulation a " 'reasonable' construction of ERISA," *id.*, based upon the history of paid vacations, the regularity of the payments, the consistency of the DOL's administrative position, and, above all, the absence of any independent funding outside the employer's own assets.

The Second Circuit adopted the Ninth Circuit's reasoning in *Shea v. Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987), adding little to it and making no reference to the intervening decisions in *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985), and *Holland v. National Steel Corp.*, 791 F.2d 1132 (4th Cir. 1986).[8] *Blakeman*, which addressed both vacation and severance benefits—both paid out of the employer's general assets—relied wholly upon the language of section 3(1) in concluding that "the severance pay and vacation provisions are 'employee welfare benefit plans' as defined in 29 U.S.C. § 1002(1)." 779 F.2d 1149.

In *Holland*, the Fourth Circuit specifically discussed the DOL regulation relied upon by the Ninth Circuit in *California Hospital Ass'n*, which the plaintiff there asserted "exempts [defendant] National's vacation plans from ERISA's preemptive effect, because the benefits are paid out of National's general funds." 791 F.2d at 1135. However, the court held that "[t]he meaning of 29 U.S.C. § 1002(1) is, however, quite plain and does not exempt National's vacation plans." *Id.* It went on

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8 Neither did it cite *Barry v. Dymo Graphic Systems, Inc.*, *supra*, which had relied upon the district court decision in *California Hospital Ass'n*.

to reject *California Hospital Ass'n* in favor of *Blakeman*. *Id.* at 1136.

**B.**

That any statutory construction must start with the specific terms of the statute being construed is axiomatic. Extrinsic evidence of Congressional intent, such as legislative history or administrative interpretation and enforcement, may be resorted to only where there is silence or ambiguity in the language of the statute. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. ____, ____, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313, 324 (1988). Indeed, this is particularly true in the case of a statute such as ERISA, which this Court has frequently characterized as a "comprehensive and reticulated statute." *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), *quoting Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

Section 3(1) of ERISA is clear and unambiguous on the relevant issue of its coverage of vacation pay plans. The section provides, now as it has since its enactment, that the terms

> "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . vacation benefits. . . .

The GAF Plan, like those in *California Hospital Ass'n*, *Shea*, *Blakeman*, and *Holland*, is clearly a "plan, fund, or program . . . maintained by an employer . . . for the purpose of providing . . . vacation benefits. . . ." As such, each clearly would come within the literal language of the statute.

There is no question that each of the employers involved, including GAF, was engaged in commerce or in an industry or activity affecting commerce within the meaning of section 4(a)(1) of ERISA, 29 U.S.C. § 1103(a)(1), and that there is no statutory exemption in section 4(b) thereof, 29 U.S.C.

§ 1003(b), that applies to such a plan. So, given the clear and unambiguous language of section 514(a), 29 U.S.C. § 1144(a), the result that necessarily follows is the preemption of state law insofar as it relates to such a plan. This Court has had the occasion in a number of cases to declare and uphold the broad scope of ERISA preemption as to both pension and welfare plans. *E.g.*, *Alessi, supra*; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. ____, 107 S.Ct. 1549, 95 L.Ed. 39 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. ____, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); and, most recently, *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. ____, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), relating to a funded vacation plan.

This unquestionably would have concluded the matter in all of the circuits were it not for the DOL's adoption of 29 C.F.R. § 2501.3-1(b). There is no question that the regulation purports to do precisely what the Ninth Circuit attributed to it in *California Hospital Ass'n*, that is, to exclude from classification as a welfare plan, and instead classify as a "payroll practice," any "[p]ayment of compensation, out of the employer's general assets, . . . while an employee is on vacation. . . ." The question presented here, as in each of the conflicting circuit and state court decisions, is whether this regulation is to be given effect.

Without doubt, the regulation is not a "legislative regulation," which is entitled to "more than mere deference" and "can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Batterton v. Francis*, 432 U.S. 416, 426 (1977). Congress has nowhere expressly delegated to the Secretary of Labor the

power to determine what shall and shall not constitute a welfare plan. *Cf. id.* at 425.[9]

Thus, the present regulation is merely an "interpretative regulation," to which "a court is not required to give effect," but which is entitled merely to "[v]arying degrees of deference." *Id.* at 425 n. 9. Plainly, however, there is no amount of deference that must be accorded a regulation that contravenes, rather than draws from, the statute it purports to construe. *K Mart Corp., supra*, 486 U.S. at ____, 108 S.Ct. at 1818, 100 L.Ed.2d at 324; *Chevron, supra*, 467 U.S. at 843 n.9.

Not only does section 3(1) of ERISA *not* delegate to the DOL authority to define what does and does not constitute a welfare plan, but its very detailed and precise specification of those types of benefits that will give rise to a welfare plan precludes all need for definition by regulation. Certainly, it cannot come within the scope of "interpretation" of a statute to declare, as this regulation purports to do, that a particular type of benefit that Congress has expressly declared should be the basis for classification as a welfare plan is not such a basis and does not fall within the definition. A regulation that is inconsistent with the statute palpably may not stand. *See K Mart Corp., supra*, 486 U.S. at ____, 108 S.Ct. at 1817, 100 L.Ed.2d at 324; *Chevron, supra*, 467 U.S. at 843 n.9. That is precisely what this DOL regulation is.

The language of section 3(1) is quite clear and unambiguous. It expressly includes "vacation benefits" among those benefits that are to be considered welfare benefits. The language of inclusion is qualified in no way. Certainly, the term "vacation benefits" is sufficiently clear in its plain English meaning to require no interpretation or further definition, let alone to permit any exclusion of vacation benefits. Under the circum-

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9 Contrast ERISA § 3(2)(B), 29 U.S.C. § 1102(2)(B), as amended by the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, Title IV, § 409, 94 Stat. 1307, which gave the DOL authority, by regulation, to prescribe rules for classifying certain severance pay arrangements and supplemental retirement income payments as welfare plans rather than pension plans.

stances, it simply cannot be said that the DOL's position "is based on a permissible construction of the statute." *Chevron, supra*, 467 U.S. at 843.

The Ninth Circuit in *California Hospital Ass'n* attempted to justify the position taken in the regulation in a variety of ways. One was the absence of funding in a vacation benefit plan where benefits are paid out of the employer's general assets. However, there simply is nothing in ERISA that justifies a distinction between funded and unfunded welfare benefit plans. On the contrary, that welfare benefit plans are subject to Title I of ERISA, whether funded or unfunded, is beyond doubt. Part 3 of Title I, which mandates funding of benefits for employee pension benefit plans, expressly excludes employee welfare benefit plans by section 301(a)(1), 29 U.S.C. § 1081(a)(1). Further, as this Court has pointed out in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ____, ____ n.5, 107 S.Ct. 2211, 2215 n.5, 96 L.Ed.2d 1, 8-9 n. 5 (1987), section 3(1) of ERISA "has been construed to include severance benefits paid out of general assets, as well as out of a trust fund," citing, *inter alia*, *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986); and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986).

*Fort Halifax* leaves no doubt that the GAF Plan, like all vacation benefit plans, whether funded or merely paid from general assets of the employer, is a "plan." There, the Court distinguished an obligation to make a one-time payment, such as the Maine statute there at issue required, "from a requirement that an employer pay ongoing benefits on a continuous basis." 482 U.S. at ____, 107 S.Ct. at 2219, 96 L.Ed.2d at 13. The latter, of course, is the indicium of a "plan."

*Fort Halifax* also answers the attempt by the DOL (*see* 40 Fed. Reg. 24,642-43 (1975)) and the Ninth Circuit (*see* 770 F.2d at 860) to distinguish between welfare plans and "payroll practices" on the basis of whether or not the benefit is "triggered by contingencies."[10] This Court's upholding of the Maine statute

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10 *See, e.g., California Hospital Ass'n, supra*, 770 F.2d at 860; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985).

in *Fort Halifax* against a claim of preemption was based precisely upon the fact that, under that statute, "the employer's obligation is predicated on the occurrence of a single contingency that may never materialize." 482 U.S. at ____, 107 S.Ct. at 2218, 96 L.Ed.2d at 12. The Court distinguished that situation from "a requirement that an employer pay ongoing benefits on a continuing basis." 482 U.S. ____, 107 S.Ct. at 2219, 96 L.Ed.2d at 13.

The Ninth Circuit also attempted to justify the DOL's administrative exclusion of unfunded vacation plans as avoiding the need for "compliance by each employer with numerous statutory requirements for formulating plans, establishing procedures, giving notices, and filing reports," 770 F.2d at 860. This conclusion must also fall. If that were the objective of the DOL in promulgating its regulation, it certainly was not necessary for the DOL to "define" unfunded vacation plans out of the welfare plan definition of section 3(1). The DOL has ample authority under the reporting and disclosure requirements of Part 1 of Title I of ERISA to exclude such plans from those requirements. Section 104(a)(3) of ERISA, 29 U.S.C. § 1024(a)(3), provides that the DOL "may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this title. . . ."[11] Had the DOL acted under this provision, rather than under section 3(1), its resulting regulation plainly would have been a valid "legislative regulation" entitled to the force of law. *Batterton v. Francis, supra.*

This Court, in *Fort Halifax*, explained lucidly the reasons why federal preemption *is* necessary *here* in stating why it *was not* necessary *there*. As the Court there stated:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the avail-

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11 See Remarks of Senator Williams, III Legislative History of the Employee Retirement Income Security Act of 1974 at 4742 (1976), correlating this power to exempt with the expansion of the scope of "welfare benefit plans" by ERISA.

> ability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others. 482 U.S. at ____, 107 S.Ct. at 2216, 96 L.Ed.2d at 10.

*See also Commonwealth v. Morash*, *supra*, 402 Mass. at 291-93, 522 N.E.2d at 412-13.

This reasoning is as applicable to the payment of vacation benefits as it is to the payment of severance benefits. This is vividly demonstrated by *Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 774, 183 Cal.Rptr. 846, 647 P.2d 122 (1982).[12] The court there construed and applied a California statute that mandated vesting and nonforfeitability of vacation pay. Congress provided for this in section 203(a) of ERISA, 29 U.S.C. § 1053(a), but only as to pension plans, excluding welfare plans in section 201(1), 29 U.S.C. § 1051(1).[13] The court concluded that "vacation pay is simply a form of deferred compensation" that "is similar to pension or retirement benefits, another form of deferred compensation." 31 Cal.3d at 780, 183 Cal.Rptr. at

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12 The author of the *Note*, upon which the Supreme Court of New Jersey relied herein, cites *Suastez* appropriately as an example of the "dramatic" nature of the "consequences to the employee of applying state law"—and no less to the employer. 87 Colum. L. Rev. at 1714. Notably, it is the only post-ERISA case that is cited for this point. *Id.* at 1714 n. 83. *Suastez* itself relied entirely upon pre-ERISA decisions.

13 See ERISA § 201(1), 29 U.S.C. § 1051(1), which expressly excludes welfare plans from, *inter alia*, the vesting requirements of § 203, 29 U.S.C. § 1053.

849, 647 P.2d at 125. It is inconceivable that the same vacation pay plan that the Supreme Court of California likens to a plan providing pension or retirement benefits could be relegated by the DOL, at the same time, to the status of a mere "payroll practice," not even attaining the status of a welfare plan. Such a result is plainly inconsistent with the intent of Congress to preclude any requirement of vesting from being mandated by law for welfare plans.[14]

Even more pernicious, however, is the havoc that allowing each State to decide for itself how vacation pay is to be regulated would wreak upon the Congressional scheme of uniformity of regulation inherent in section 514(a) of ERISA, 29 U.S.C. § 1144(a). The mere possibility that each of the 50 States might supply its own particular view of what should be sound vacation pay policy demonstrates why preemption of state law in the vacation plan context is so critical. It also vividly demonstrates that Congress must have contemplated the applicability of preemption in this area—as, indeed, the express inclusion of "vacation benefits" in Section 3(1) of of ERISA makes abundantly clear.

The New Jersey Supreme Court suggested the "illogic" of preempting state regulation without "providing any correlative federal regulatory standard under ERISA" (App. 6a). This can be answered simply: Congress made the determination that welfare plans, unlike pension plans, should not be subject to the substantive regulations of their contents decreed in Parts 2 and 3 of Title I of ERISA. That judgment—which applies to *all* welfare plans—is unmistakable and can be altered only by Congress. *See Metropolitan Life v. Massachusetts, supra*, 471 U.S. at 732; *Alessi, supra*, 451 U.S. at 521; *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. ____, ____, 108 S.Ct. 830, 837, 98 L.Ed.2d 936, 948 (1988).

It should be observed that leaving the contents of vacation plans to the parties to the contractual relationship does not cre-

14 The issue of ERISA preemption was not discussed by the *Suastez* court.

ate a regulatory vacuum for vacation pay plans any more than it does for other welfare plans. Certainly, all welfare plans are subject to the fiduciary standards of Part 4 of Title I of ERISA. Furthermore, it is generally agreed that, where needed, a body of federal common law can and should be developed.[15]

In sum, the clear and unambiguous provisions of section 3(1) of ERISA and the carefully crafted policy of preemption set forth in section 514(a) mandate the conclusion that a vacation pay plan is a welfare plan subject to Title I of ERISA, which supersedes and preempts state law as it relates to such a plan. Insofar as the Supreme Court of New Jersey concluded to the contrary, its decision contravenes the will of Congress and the Supremacy Clause of the Constitution and should be reversed.

## II. THE NEW JERSEY SUPREME COURT'S DECISION REQUIRING *DE NOVO* REVIEW OF A FIDUCIARY'S DENIAL OF BENEFITS CONFLICTS WITH THE DECISIONS OF MOST COURTS OF APPEAL AND WITH THE LANGUAGE AND INTENT OF ERISA.

The reasons for and arguments in support of granting certiorari as to the second issue presented in this case—that of the correct standard of review, under ERISA, of a plan administrator that also is the employer-sponsor of the plan—have been well and fully articulated in the petition for certiorari filed in *Firestone*, No. 87-1054. Moreover, this Court has considered the issue to be worthy of review on its merits, having granted that petition on April 4, 1988. For that reason, we shall not restate the arguments in favor of this Court's granting of certiorari to review the adoption by the Supreme Court of New Jersey in this case of the Third Circuit's rejection in *Firestone* of the application of the "arbitrary and capricious" standard of review. We shall rely instead upon the argument set forth in the *Firestone* petition and this Court's grant thereof.

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15 *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); Bruce, *Pension Claims: Rights and Obligations*, pp. 299-303 (1988) (extensive collection of authorities).

The present case is a worthy companion case to *Firestone*. It not only presents the issue as to the scope of review of claims determinations of plan fiduciaries now before the Court therein, but does so in the critical context of the interrelationship of ERISA and state law. Moreover, the case affords an opportunity to articulate a uniform standard of review for all types of employee welfare benefit plans, including unfunded vacation plans, which are so prevalent throughout the United States, and, thereby, eliminate the potential of piecemeal review of standards being applied to different kinds of employee welfare benefit plans. Review should be granted herein.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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AUGUST 1988

# APPENDIX

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## APPENDIX A

SUPREME COURT OF NEW JERSEY

A-70 September Term 1987

ROSEMARIE ERICH, CONCEPCION REIDER and ELIZABETH ZONDLER, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants*,

—v.—

GAF CORPORATION, a Delaware Corporation,

*Defendant-Respondent*,

—and—

JOHN DOES, being fictitious names and HERBERT HOES, being fictitious names, individually,

*Defendants.*

Argued January 19, 1988—Decided May 10, 1988.

The opinion of the Court was delivered by O'HERN, J.

This case concerns the appropriate standard of judicial review to be used in analyzing an employer's determination of employees' entitlement to accrued vacation pay on layoff. There are two aspects to the issue, namely, (1) whether the question should be decided under federal law because the Employee Retirement Income Security Act of 1974, 29 *U.S.C.A.* §§ 1001 to 1461 (ERISA) preempts this aspect of employee relations, and, (2) depending on whether federal or state law governs, what standard of review should apply.

This case presents an unusual analytical exercise in that both parties have argued before us that this matter is to be decided under federal law despite a divergence in federal precedent regarding the issue, *see California Hosp. Ass'n v. Henning*, 770 *F.*2d 856 (9th Cir. 1985), *cert. denied*, ____ U.S. ____, 91 *L.Ed.*2d 564 (1986) (vacation pay not preempted by ERISA), and *Holland v. National Steel Corp.*, 791 *F.*2d 1132 (4th Cir. 1986) (vacation pay preempted), and despite a federal regulation expressly disclaiming ERISA preemption of vacation pay benefits. 29 *C.F.R.* § 2510.3-1(b)(3)(i) (1987).

The trial court, believing that ERISA permitted but a narrow scope of judicial review of plan administration, limited its review to a consideration of whether the employer's action in disallowing the vacation pay or changing the vacation pay policy was "arbitrary or capricious." The standard is familiar. We use it when reviewing agency action, *Public Serv. Elec. and Gas Co. v. New Jersey Dep't of Envtl. Protection*, 101 *N.J.* 95, 103 (1985), or one similar in reviewing certain private actions impacting on the public interest, *Berman v. Valley Hosp.*, 103 *N.J.* 100, 106-08 (1986). Without suggesting that we are bound by the stipulation of the parties, we find that the policies that favor non-preemption in this area of employer-employee relations support a broader standard of review under either state or federal law. Consequently, we reverse the judgments below and remand the case for further consideration in accordance with this opinion.

## I

As noted, this case arises from a dispute over vacation pay that discharged employees of GAF claim as their due. In essence, the question is whether an employee discharged in mid-year is entitled to be paid, on an anniversary-year basis or on a calendar-year basis, for the prorated unused vacation days accrued during the year of discharge in addition to the unused vacation days from the previous year.

The controversy was caused by a shift in the employer's vacation policy from the anniversary-of-employment basis to the

calendar-year basis. At stake for terminated employees is the value of earned vacation days lost by the shift. This issue may not seem momentous in its recital, but it means a lot to those who worked hard for a few days or weeks of vacation. The plaintiff employees are particularly aggrieved by what they regard as GAF's unilateral change in the terms of the employment for the purpose of cutting costs in anticipation of mass layoffs. Because this case comes before us on review of the grant of GAF's motion for summary judgment, we are bound to accept plaintiffs' version of the events as true and to accept all the favorable inferences that might be drawn from those facts. *E.g., Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 61 (1980).

The factual background for these issues may be drawn from the statement of Edith H. Gazda, GAF's former Director of Compensation. She explained that under GAF's pre-1980 general vacation policy, no vacation was earned at all unless an employee had worked for a fixed period of time, either six months or a year. Only then would an employee be allowed to take vacation. "Thus, there was a continuing cycle of working one year for vacation and taking it the next." She also noted that the company's 1979 Policy Manual provided that employees terminating service with GAF "would be entitled to one-twelfth (1/12) of their unused vacation pay for *each month they worked in a calendar year* in which they terminated." (Emphasis added). However, the 1979 policy had a flaw that enabled employees to beat the system by taking their full vacation entitlement early in a work year, prior to an anniversary date, only to return to work and announce they were quitting. By contrast, responsible employees who gave notice of their intent to resign received only a prorated portion of their vacation pay based on the number of months they had worked that year. Yet another problem was posed by pending changes in state law that would require companies to reimburse employees for the amount of vacation they had earned by working prior to the terminations on the basis of an "earned-right" concept of vacation pay.

Consequently, the Director of Compensation developed a new policy in 1980 embracing an "earned-right" concept of vacation pay as determined by the employee's anniversary ser-

vice date. Under this new program employees worked from anniversary date to anniversary date; on reaching their anniversary dates, employees would be entitled immediately to take the entire entitlement for the previous work year. Each month thereafter, the employees would earn and accrue one-twelfth of their vacation entitlement for the current year. Employees could not take accrued time until their next anniversary date, but employees leaving prior to their next anniversary date were entitled to a prorated percentage of their vacation entitlement.

This new policy was incorporated in the 1980 Policy Manual (1980 PM) and was implemented throughout the GAF organization. In response to employee inquiries, the Director prepared a number of examples of how the policy was to be applied. Plaintiffs rely on these examples to support their contentions. The Director stated that when she retired in March 1981, the proper method of calculation for paying terminating employees for unused vacation days under the 1980 PM was as follows:

(a) ascertain the employee's anniversary date and as of that date credit the employee with an entire year's worth of vacation;

(b) calculate the number of months from an employee's prior anniversary date to the date of termination, crediting partial months of service including two weeks or more as a whole month;

(c) for each month of service after the employee's anniversary date, credit the employee with an additional one-twelfth (1/12) of the vacation entitlement that the employee would have been able to take on the following anniversary date;

(d) from the number of days thus calculated, subtract any vacation days taken since the employee's last anniversary date; and

(e) multiply the total days by the employee's daily salary.

Again, assuming as we must the validity of plaintiffs' allegations, the 1980 vacation pay policy was consistently applied through that year and most of 1981. Plaintiffs allege that toward the end of 1981, however, GAF knew that it would be

terminating substantial numbers of employees. Accordingly, management proposed to "change[ ] the rules of the game so as to provide that employees did not earn vacation [benefits] from their anniversary dates, but rather from January 1 of the calendar year in which the vacation would be taken." Another GAF official noted: "[t]he old policy stated that the employees earned vacation days based on their anniversary year. [T]he new policy eliminates the anniversary year concept in favor of the calendar year concept." Plaintiffs allege that the losses suffered are substantial, and point to a hypothetical example of employees with anniversary dates of September 1 and termination dates of January 31, 1982. Presuming that the employees had taken all of their vacation in the summer of 1981 and took no vacation after 1982, the employees would have been entitled to be paid five-twelfths of their vacation entitlement under the old policy—entitlement for September, October, November, December and January—and only one-twelfth of their vacation entitlement (entitlement for January) under the new policy.

We include only the procedural details necessary for our disposition. Plaintiffs, who are terminated employees aggrieved by the withholding of their vacation pay, commenced their suit in the Law Division in late 1982, alleging that GAF had breached the contractual terms of employment set forth in the 1980 PM. Plaintiffs sought to have the action certified as one on behalf of a class consisting of all persons nationwide who were salaried non-union employees of GAF and who were terminated by the company between December 1, 1981, and December 13, 1982. The trial court directed the parties to brief the question of whether ERISA preempted plaintiffs' claims. Based on the trial court's ruling that ERISA preempted the issue, plaintiffs were directed to file an amended complaint alleging violations under that Act. The trial court then certified the action as involving a nationwide class. Before giving notice to the class, GAF was given an opportunity to file a cross-motion for summary judgment. At that time, the trial court summarily disposed of the contentions of the plaintiffs on the merits, holding that the "internal sense" of the 1980 PM and the circumstances surrounding its enactment supported GAF's contention that "a paid vacation is attributable to work previously rendered rather

than to work expected to be performed." The trial court concluded that even if the 1980 PM were arguably ambiguous, the appropriate test was whether GAF's interpretation was "arbitrary and capricious." *Tanzillo v. Local 617, I.B.T.*, 769 *F.*2d 140, 147 (3rd Cir. 1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 *F.*2d 325, 333 (3rd Cir. 1984). The Appellate Division affirmed in an unreported *per curiam* opinion on the basis of the opinion below. We granted certification. 108 *N.J.* 193 (1987).

II

A recent commentator has succinctly summarized the countervailing policy arguments at stake in the issue of preemption. Note, "Unfunded Vacation Benefits: Determining the Scope of ERISA," 87 *Colum. L. Rev.* 1702 (1987). After analyzing the relevant precedent and sources, the author observes that "[n]either the legislative history of ERISA nor the structure of the Act supports a reading that it includes unfunded vacation benefits within its scope. In addition, Congress' overall purpose in enacting ERISA would be frustrated if state law governing unfunded vacation benefits were preempted." *Id.* at 1708.

The rationale that underlies this conclusion is the illogic of a finding that Congress would have acted to preempt state law without providing any correlative federal regulatory standards. A clear distinction has been drawn between federal regulation of unfunded and funded employee benefits with the latter primarily being seen as pension benefits subject to a very complex set of regulations governing the conduct of employers.

> The legislative history indicates that Congress' primary concern in enacting ERISA was to control two major abuses, "mismanagement of funds accumulated to finance such benefits, and failure to pay employees the benefits promised" from the accumulated funds. Vacation benefits paid from an employer's general assets present neither of these problems; they are funded by the same resources that fund the ordinary payroll. Therefore, no special fund to administer and no special risk of loss or nonpayment exist.
>
> [*Id.* at 1709 (citation omitted) (footnotes omitted).]

Hence, we agree that it is probably incorrect to assume that Congress intended that issues of vacation pay should become issues of federal law. But since the parties have argued the case on the basis that the vacation pay issue is preempted by ERISA, we must consider how courts would review such matters under federal law. What is at stake here in the choice of the standard of judicial review is very significant. As GAF argues forcefully in its brief, the majority view of the standard of judicial review of determinations of claimed eligibility under ERISA is whether or not the plan administrator or trustee acted "arbitrarily or capriciously." *Holland v. Burlington Indus. Inc.*, 772 *F.*2d 1140, 1149 (4th Cir. 1985), *aff'd sub nom. Brooks v. Burlington Indus., Inc.*, ____ U.S. ____, 91 *L.Ed.*2d 559 (1986); *Tanzillo v. Local 617, IBT, supra*, 769 *F.*2d at 147; *Ellenberg v. Brockway, Inc.*, 763 *F.*2d 1091, 1093 (9th Cir. 1985). So settled is the standard that it is described as the "black-letter rule." *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 *F.*2d 1048, 1049 (7th Cir. 1987) (Posner, J.). The employer recognizes, as we do, that the "arbitrary and capricious" standard has been characterized as being highly deferential, *Struble v. New Jersey Brewery Employees' Welfare Trust Fund, supra*, 732 *F.*2d at 333, and limits the judiciary's role to determining whether the trustee's or plan administrator's interpretation of the plan was rational, not whether it was fair. Thus, in GAF's view, as long as its interpretation and modification of the 1980 vacation guideline was reasonable, they must, as the lower courts found, be upheld.

But it is precisely because Congress has extensively regulated the conduct of employers in the handling of funded pension benefits that courts have taken a necessarily limited view of their judicial role. Thus, when Congress has " 'establish[ed] standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans by providing for appropriate remedies, sanctions, and ready access to the Federal courts,' " *Powell v. Chesapeake and Potomac Tel. Co.*, 780 *F.*2d 419, 421 (4th Cir. 1985), *cert. denied*, 476 *U.S.* 1170, 90 *L.Ed.*2d 980 (1986) (quoting 29 *U.S.C.* § 1001(b), courts should wisely exercise deference. But if we apply these same standards in the case of unfunded vacation pay and all state regulation is preempted,

vacation benefits would be left unregulated because of the apparent lack of any federal standards that govern the conduct of employers in this area. "Interpreting the preemption clause so broadly, therefore, frustrates Congress' objective to minimize the mismanagement of funds and secure payment of benefits for employees, and deregulates the field without any consideration of the impact on employers and employees." "Unfunded Vacation Benefits," *supra*, 87 *Colum. L. Rev.* at 1710 (footnote omitted).

In *Bruch v. Firestone Tire and Rubber Co.*, 828 *F.*2d 134, 147 (1987), the Third Circuit recently held that in the case of unfunded plans, as here, not involving neutral plan administrators, the standard of review under ERISA is less deferential and requires a broader inquiry under "principles of contractual construction." Because the district court's scope of review in the *Firestone* case was "outcome determinative," the Third Circuit remanded for further proceedings the trial court's finding of no "arbitrary or capricious" decisionmaking by the employer. *Id.* at 147. Judge Posner noted in *Van Boxel, supra*, 836 *F.*2d 1049, that "there is growing skepticism about the orthodox [arbitrary and capricious] approach." He suggests yet another alternative: "a sliding scale of judicial review of ERISA trustees' decisions." *Id.* at 1053. The factors that suggest that ERISA does not preempt the unregulated field of vacation severance pay tend to suggest that the scale of judicial review should allow for "the necessary adjustments for possible bias in * * * the trustees' decision[s]." *Id.* at 1053.

*Certiorari* to the United States Supreme Court has been granted in *Firestone* to resolve the federal conflict regarding the appropriate standard for judicial review of an employer's determinations under ERISA. ____ *U.S.L.W.* ____ (U.S. April 4, 1988) (No. 87-1054). As we await that resolution, rather than create a conflict within New Jersey, depending on the choice of state or federal forum, and because we believe that the policies of the law with respect to preemption do not apply with equal force to unfunded vacation pay benefits, we conclude that the *Firestone* standard is the correct standard to be applied in these circumstances. That standard is similar to the standard of review that would be applicable under state law.

Before us GAF argued that regardless of the test employed, its conduct met both standards and that this finding is implicit in the trial court's decision. In the alternative, GAF argues that we can resolve the application of either legal test to the facts. We decline to make that evaluation on the record before us.

The judgment of the Appellate Division is reversed and the matter remanded to the Law Division for further proceedings in accordance with this opinion. That court shall determine whether or not plaintiffs have established a claim based on principles of "contractual construction." *Bruch v. Firestone Tire and Rubber Co. supra*, 828 *F.*2d at 147. It shall also resolve whether the record before it suffices to dispose of the claims summarily on the basis that there is no genuine issue of fact about whether plaintiffs' pleadings and allegations establish a cause of action for contractual claims of compensation.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, Garibaldi, and Stein join in this opinion.

## APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3401-85T7

ROSEMARIE ERICH, CONCEPCION REIDER and ELIZABETH ZONDLER, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants and Cross-Respondents,*

—v.—

GAF CORPORATION,

*Defendant-Respondent and Cross-Appellant,*

—and—

JOHN DOES, being fictitious names, and HERBERT HOES, being fictitious names,

*Defendants.*

Argued January 22, 1987—Decided March 17, 1987

PER CURIAM

Plaintiffs appeal from a summary judgment dismissing their complaint in which they sought recovery of vacation-pay benefits upon termination of employment under a guideline adopted by defendant GAF on August 1, 1980. GAF cross-appeals from the Law Division judge's denial of its demand for counsel fees.

We affirm the orders granting summary judgment and denying counsel fees substantially for the reasons expressed by Judge Alterman in his letter opinions dated December 27, 1985 and January 29, 1986.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ JOHN J. MUSEWICZ
John J. Musewicz
*Acting Clerk*

## APPENDIX C

SUPERIOR COURT OF NEW JERSEY

*Erich vs. GAF Corp., et als.*

*Docket No. L 23884-82*

December 27, 1985

ALTERMAN, J.S.C.

Plaintiff and defendant each moved for summary judgment. Each contends that there is no genuine issue of material fact and that the sole issue is the proper interpretation of defendant's written personnel policy promulgated August 1, 1980. The policy is referenced MP-P9 and concerns vacation and termination pay.

It is not disputed that the MP-P9 was developed to prevent an employee from receiving a paid vacation period and then terminating employment with defendant before completing his entire year of service. To accomplish this end, defendant determined to institute a policy that would both accord each employee an appropriate annual paid vacation period and provide defendant with a method of recouping a part of the vacation payment that is considered was unfairly received because of the truncated employment period. Thus, the MP-P9 provides:

> "Vacation time will be earned for exempt and non-exempt salaried non-union employees based on each employee's anniversary service date as shown in attached schedules A&B. . . ."

The schedules set forth the number of "Days of Vaction Entitlement Earned on Anniversary Service Date in Each Calendar Year" as well as "Days of Vacation Pay Allowance," which allowance is to be computed "for each month of service since last anniversary service date or from date of hire during first year of employment."

The MP-P9 contemplates that an employee will take his vacation in the year in which it is earned, but permits "paid vacation time" prior to the employee's anniversary date. Vacation so

taken are considered "advanced vacation time" and if an employee terminates employment "prior to his/her anniversary date any ADVANCED UNEARNED VACATION pay will be deducted from the employee's final pay check" (emphasis included).

Employees who are laid off, released, discharged or resign are "granted all remaining earned vacation pay (including time earned beyond the anniversary date) provided they have worked in the calendar year in which they are terminating." As to retirees, the MP-P9 provides:

> "Retirees (aged 55 and over) leaving prior to anniversary service date are eligible for full vacation entitlement less any vacation days taken in the calendar year.
>
> "Retirees leaving after their anniversary service date will receive accrued vacation pay for time earned beyond the anniversary date less any vacation days taken in the calendar year."

Plaintiff interprets the MP-P9 to require defendant to pay non-retiring employees a vacation benefit computed in the following way: (1) on the employee's anniversary date, credit him with the number of vacation days due based on his years of service; (2) add $^1/_{12}$th of this period for each month of service after the employee's anniversary date; (3) on termination, deduct the number of vacation days used since the prior anniversary date.

Defendant's interpretation of the MP-P9 requires an additional step: (4) deduct $^1/_{12}$th of the employee's vacation period for each month less than one year the employee worked. In short, defendant seeks to recapture from the terminating employee the number of vacation days paid but not yet earned.

Put another way, plaintiff would attribute to the employee his vacation entitlement on his anniversary service date. Defendant contends that the employee is entitled to a paid vacation after he has earned it.

In interpreting the MP-P9, the goal is to ascertain and give effect to this intent. *Verhagen v. Platt*, 1 *N.J.* 85 (1948). In this quest, it is appropriate to consider the surrounding circumstances and the objects sought to be accomplished. *Moses v.*

*Edward H. Ellis, Inc.*, 4 *N.J.* 315 (1950); *Casriel v. King*, 2 *N.J.* 45 (1949). If the policy is interpreted in the manner urged by plaintiff, the purpose giving rise to its formulation would be thwarted. Instead of modifying what defendant considered to be an unfair practice, detrimental to the company, the new policy would perpetuate it. The internal sense of the document amply supports defendant's interpretation. The intention that a paid vacation is attributable to work previously rendered rather than to work expected to be performed is revealed in the mode of computation included in MP-P9.

The document instructs that pay allowances computed from the last anniversary date or from date of hire during the first year. Hence, until an employee has performed services for six months, he is not entitled to any vacation. He accumulates, or earns, time toward a vacation as his employment continues. When he has worked twelve months, that is, on his anniversary date, he has become entitled to a paid vacation period. There is nothing in the MP-P9 to support a contention that on the employee's first anniversary date he is entitled to two paid vacations.

The concept that a vacation is earned as the employee continues his service is also demonstrated by providing that "advanced vacation time" will be deducted from the employee's final pay check. The policy specifically refers to "advanced unearned vacation." If, as of his anniversary service date, an employee is entitled to a paid vacation for the following year, there cannot be an "advanced" vacation and the concept of "earned" is entirely irrelevant. Under this interpretation, the vacation would be taken after the employee's entitlement to it was fixed and, since he was already entitled to a vacation, there would be no need to earn it.

Finally, the manner in which the MP-P9 deals with retirees and other terminating employees disclosed defendant's intent to pay only retirees for unearned vacations. Retirees are specifically granted a paid vacation period in the "calendar year" in which they retire. Defendant deducts vacation days used in that calendar year or pays additional compensation for time earned after the anniversary date. Other terminating employees, however, receive only the "earned vacation pay" remaining after

deducting vacation days already used. Had defendant intended to grant other employees the same benefits it extends to retiring employees, the same or similar language would have been used. The use of different language indicates an intent to treat the two classes differently.

Defendant's interpretation of its policy is consistent with the language of the MP-P9 and effectuates its intent.

Plaintiff argues that the MP-P9 is at least ambiguous and should therefore be construed in favor of plaintiffs. That principle is not applicable here. *Smith v. CMTA-IAM Pension Trust*, 654 *F.*2d 650 (9th Cir. 1981). Rather, the appropriate test even assuming the MP-P9 is ambiguously written, is whether defendant's interpretation is arbitrary or capricious. *Tanzillo v. Local 617, I.B.T.*, 769 *F.* 2d 140 (3rd. Cir. 1985); cf. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F. 2d 325 (3rd Cir. 1984). *Struble* indicates that where the issue is a denial of personal claims for benefits, it is appropriate to apply the "arbitrary and capricious" standard: where the issue is the legality to deny benefits, the more stringent "sole benefit" standard applies.

In *Jung v. FMC Corp.*, 755 *F.* 2d 708 (9th Cir. 1985), a class action was commenced for severance pay under an ERISA welfare benefit plan. The defendant's employees were denied severance pay when they were transferred from FMC's payroll to the payroll of a purchasing company. In concluding that the "arbitrary and capricious" standard applied, the court stated:

> ". . . Here we are dealing with the interpretation by an employer/administrator of the terms of the employer's unfunded welfare benefit plan. We see no reason why ERISA calls for a different standard of review here. Courts have applied that standard of review to actions administering unfunded employee welfare benefit plans like this one. (Citations omitted). Where the language used by the employer in holding out the plan is open to a construction supporting denial of a claim, the court should decide whether the choice of that construction is arbitrary or capricious. *Id.* at p. 711.

In distinguishing *Jung* from the *Struble* case, the court observed:

> ". . . Plans like the one before us have no arrangement for funding, the employer has formulated the terms under which benefits will be paid, benefits are paid directly by the employer, and the employer makes all decisions on claims. Whatever may be the appropriate standard of review in cases like *Struble*, the arbitrary and capricious standard seems adequate for the purposes of ERISA in the situation before us. Where, as here, the employer's denial of benefits to a class avoids a very substantial outlay, the reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision. . . ." *Id.* at pp. 711-712.

Here, as in *Jung*, the plan was not funded, the terms under which benefits were to be paid were formulated solely by defendant; defendant paid benefits directly and defendant made all decisions with respect to claims. Although there is no evidence before me with respect to the cost of interpreting the plan as plaintiff contends, it may be assumed that the outlay would be substantial. Although that consideration is present, it is not by itself controlling.

Accordingly, defendant's motion for summary judgment is granted. Plaintiffs' motion for summary judgment is denied. Defendant will please submit an appropriate form of order on five days notice.

## APPENDIX D

SUPERIOR COURT OF NEW JERSEY

*Erich vs. G.A.F.*

*Docket No. L 23884-82*

January 30, 1985

ALTERMAN, J.S.C.

Plaintiff moved to certify the captioned matter as a class action.

Plaintiffs, former employees of defendant, bring this action for accrued vacation pay which defendant refused to pay upon termination of their employment. Plaintiffs' amended complaint alleges four common law causes of action: breach of employment contract, conversion, unjust enrichment and tortious interference with a contractual relationship.

At the court's request, counsel briefed and argued the issue of federal preemption. For the ensuing reasons, I am satisfied that the common law causes of action pleaded are preempted by the provisions of the Employee Retirement Income Security Program (ERISA), 29 *U.S.C.* Sec. 1001, et seq.

Pursuant to 29 *U.S.C.* Sec. 1003(a)(1), ERISA's provisions apply to any "employee benefit plan" established or maintained by "any employer engaged in or in any industry or activity affecting commerce." Defendant is engaged in interstate commerce.

An "employee benefit plan" means an "employee welfare benefit plan", 29 *U.S.C.* sec. 1002(3), and "employee welfare benefit plan" includes any "plan, fund or program" which is maintained for the purpose of providing vacation benefits for its participants or their beneficiaries "through the purchase of insurance or otherwise." 29 *U.S.C.* Sec. 1002(1).

The Secretary of Labor, however, pursuant to the authority granted him in 29 *U.S.C.* Sec. 1135, promulgated a regulation which seemingly excludes from this definition vacation benefits paid from the employer's general assets. The regulation provides, in its applicable part:

> ". . . the terms 'welfare benefit plan' and 'welfare plan' shall not include (3) payment of compensation out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example-(i) payment of compensation while an employee is on vacation." 29 *CFR*, Sec. 2510.3-1(b)(3)(i).

Although payment of vacation pay to defendant's employees is made from general assets, resolution of this dispute must be governed by the provisions of ERISA.

In *Donovan v. Dillingham*, 688 *F.2d.* 1367, (11 Cir. 1982), the court concluded that a plan or program requires only that a reasonable person must be able to ascertain from the surrounding circumstances "the intended benefits, the intended beneficiaries, a source of financing and a procedure for applying and collecting benefits," *Id.* at p. 1373. In *California Hosp. Ass'n. v. Henning*, 569 *F.Supp.* 1544 (C.D. Cal. 1983), plaintiff trade associations brought an action to declare invalid a State enforcement policy which had the effect of regulating vacation plans and programs of plaintiffs and their members. Plaintiffs' main contention was that the regulation was prohibited by principles of federal preemption invoked by ERISA. Confronted with the regulation, they suggested that it should be interpreted as governing only those situations where there is a discretionary practice engaged in by the employer, rather than a plan or program to which the employer is committed. While recognizing that view as a sensible interpretation, the court nevertheless determined that it was unnecessary to adopt that construction.

> ". . . If that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with language of the statute itself and an invalid arrogation of power by the Department.
>
> The conclusion is inescapable, that any plan, fund, or program, as those terms are defined by *Donovan*, maintained for employee vacation benefits by an employer

> engaged in activities affecting interstate commerce, is an employee welfare benefit plan subject to ERISA coverage, irrespective of whether such an arrangement is funded, trustees, or embodied in a writing." *Id.* at p. 1546.

*Abella v. W. A. Foote Memorial Hosp., Inc.*, 40 *F.2d* 4 (6 Cir. 1984), affirming 557 *F. Supp.* 482 (E.D. Mich., S.D. 1983), holds to the contrary. In *Abella*, plaintiff brought an action under ERISA to compel defendants to pay accumulated sick leave. The court, deferring to the interpretation of the statute, adopted by the Department of Labor, concluded that the statute and regulation do not consider sick benefits as an employee welfare benefit plan under ERISA. *Id.* at p. 484. *California Hosp. Ass'n. v. Henning*, supra, appears to me to be the better reasoned opinion and I adopt the view it expresses.

*Petrella v. N. L. Industries*, 529 *Fed. Supp.* 1357 (D.N.J. 1982) and *Hamberlin v. V.I.P. Insurance Trust Company*, 434 *Fed. Supp.* 1196 (D. Ariz. 1977) are not pertinent. In *Petrella*, the court found that it was unnecessary to decide the validity of the regulation and in *Hamberlin*, the court concluded that the group health and accident policy was not a "plan" within the meaning of 29 *U.S.C.* sec. 514.

Since the vacation benefits in dispute derive from an employee benefit plan, the common law causes of action pleaded by plaintiff are preempted by federal substantive law. 29 *U.S.C.* sec. 1144 provides:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * *
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable

only to the District of Columbia shall be treated as a State law rather than a law of the United States."

See, *Shaw v. Delta Air Lines, Inc.*, 463 *U.S.* 85, 77 L.Ed. 2d 490, 500-501 (1983) holding that state law relating to an employee benefit plan is subject to the preemptive provisions of ERISA.

Plaintiffs argue that since their claims, though raised in terms of a common law action, are also cognizable under ERISA, this court should exercise its concurrent jurisdiction to adjudicate the dispute applying federal law. 29 *U.S.C.* sec. 1132 (a)(1)(B); 29 U.S.C. sec. 1132(e)(1). Proceedings in that fashion might retroactively, without requiring plaintiffs to assert specifically their ERISA claims, deprive defendant of its right to seek removal of the action to the federal district court. 28 *U.S.C.* sec. 1141; 28 *U.S.C.* 1146.

Accordingly, plaintiffs will have 20 days from the date of an order memorializing this ruling, to file a second amended complaint, alleging any pertinent violations under ERISA and providing that defendant will have 30 days from service of the said complaint to answer or take any other action with respect thereto. Plaintiff will submit the order on five days notice.

In the event the jurisdiction remains with this court, I will decide the pending motion for class certification.

## APPENDIX E

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

### EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA")
### 29 U.S.C. §§ 1001 *et seq.*

ERISA § 3, 29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

• • • •

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

• • • •

ERISA § 4, 29 U.S.C. § 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

* * * *

ERISA § 104, 29 U.S.C. § 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

* * * *

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this subchapter, or may provide for simplified reporting and disclosure if he finds that such

requirements are inappropriate as applied to welfare benefit plans.

* * * *

ERISA § 201, 29 U.S.C. § 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(1) an employee welfare benefit plan;

* * * *

ERISA § 301, 29 U.S.C. § 1081. Coverage

(a) Plans excepted from applicability of this part

This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than—

(1) an employee welfare benefit plan;

(2) an insurance contract plan described in subsection (b) of this section;

(3) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

(4)(A) a plan which is established and maintained by a society, order, or association described in section 501(c)(8) or (9) of Title 26, if no part of the contributions to or under such plan are made by employers of participants in such plan; or

(B) a trust described in section 501(c)(18) of Title 26;

(5) a plan which has not at any time after September 2, 1974, provided for employer contributions;

(6) an agreement providing payments to a retired partner or deceased partner or a deceased partner's successor in interest as described in section 736 of Title 26;

(7) an individual retirement account or annuity as described in section 408(a) of Title 26, or a retirement bond described in section 409 of Title 26;

(8) an individual account plan (other than a money purchase plan) and a defined benefit plan to the extent it is treated as an individual account plan (other than a money purchase plan) under section 1002(35)(B) of this title; or

(9) an excess benefit plan.

(10) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

* * * *

ERISA § 404, 29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

* * * *

ERISA § 514, 29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would

otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

# LABOR MANAGEMENT RELATIONS ACT, 1947, ("LMRA") 29 U.S.C. §§ 185, *et seq.*

LMRA § 302, 29 U.S.C. § 186. Restrictions on financial transactions

* * * *

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income

or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institu-

tions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

## CODE OF FEDERAL REGULATIONS

29 C.F.R. § 2510.3-1 Employee welfare benefit plan.

(a) *General.* (1) The purpose of this section is to clarify the definition of the terms "employee welfare benefit plan" and "welfare plan" for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition,

the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

(2) The terms "employee welfare benefit plan" and "welfare plan" are defined in section 3(1) of the Act to include plans providing "(i) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter "the LMRA") (other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

(3) Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described

in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are "* * * holiday, severance or similar benefits". Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

(4) Some of the practices listed in this section as excluded from the definition of "welfare plan" or mentioned as examples of general categories of excluded practices are inserted in response to questions received by the Department of Labor and, in the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act. Therefore, this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1).

(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as—

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons,

(ii) Payment of compensation to an employee who is absent while on active military duty,

(iii) Payment of compensation while an employee is absent for the purpose of serving as a juror or testifying in official proceedings,

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

(c) *On-premises facilities.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—

(1) The maintenance on the premises of an employer or of an employee organization of recreation, dining or other facilities (other than day care centers) for use by employees or members; and

(2) The maintenance on the premises of an employer of facilities for the treatment of minor injuries or illness or rendering first aid in case of accidents occurring during working hours.

(d) *Holdiay gifts.* For purposes of Title I of the Act and this chapter the terms "employee welfare benefit plan" and "wel-

fare plan" shall not include the distribution of gifts such as turkeys or hams by an employer to employees at Christmas and other holiday seasons.

(e) *Sales to employees.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include the sale by an employer to employees of an employer, whether or not at prevailing market prices, of articles or commodities of the kind which the employer offers for sale in the regular course of business.

(f) *Hiring halls.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include the maintenance by one or more employers, employee organizations, or both, of a hiring hall facility.

(g) *Remembrance funds.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a program under which contributions are made to provide remembrances such as flowers, an obituary notice in a newspaper or a small gift on occasions such as the sickness, hospitalization, death or termination of employment of employees, or members of an employee organization, or members of their families.

(h) *Strike funds.* For purposes of Title I and the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a fund maintained by an employee organization to provide payments to its members during strikes and for related purposes.

(i) *Industry advancement programs.* For purposes of Title I and the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a program maintained by an employer or group or association of employers, which has no employee participants and does not provide benefits to employees or their dependents, regardless of whether the program serves as a conduit through which funds or other assets are channelled to employee benefit plans covered under Title I of the Act.

(j) *Certain group or group-type insurance programs.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

(1) No contributions are made by an employer or employee organization;

(2) Participation the program is completely voluntary for employees or members;

(3) The sole functions of the employers or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

(k) *Unfunded scholarship programs.* For purposes of Title I of the Act and this chapter, the terms "employe welfare benefit plan" and "welfare plan" shall not include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization.